STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2007
v	No. 266276 Wayne Circuit Court
ANTWOINE L. PITTMAN, Defendant-Appellant.	LC No. 05-005807-01

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second-felony habitual offender, MCL 769.10, to concurrent prison terms of 96 months to 20 years for the armed robbery conviction, and 1 to 7-1/2 years for the felon-in-possession conviction, to be served consecutively to a two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentences, but vacate the order requiring defendant to reimburse the county $1,010 for attorney fees and remand for further proceedings on that issue.

Defendant first argues that the trial court's identification of him as the perpetrator is clearly erroneous and against the great weight of the evidence. We disagree.

A trial court's findings of fact in a bench trial are reviewed for clear error. *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999), aff'd 462 Mich 71 (2000). A finding is clearly erroneous "if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. at 255.

A new trial may be granted when the verdict is against the great weight of the evidence, but "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 635, 642, 647; 576 NW2d 129 (1998). Absent exceptional circumstances, issues of witness credibility are for the trier of fact. *Id*. at 642, 647. Where the question is one of credibility, the verdict may not be overturned unless the directly contradictory testimony has been so far impeached that it was deprived of all probative value or the trier of fact could not believe it. *Id*. at 643, 645-646.

In this case, the victim identified defendant as the perpetrator, while defendant and his fiancée both testified that defendant was at home at the time of the offense. The trial judge stated that "the key issue in this case is identification," and after reviewing the key testimony of the witnesses, concluded that "the People have proved beyond a reasonable doubt that Mr. Pittman assaulted Mr. Green." Because there was conflicting evidence on the question of defendant's identity as the perpetrator, this issue does not present a true challenge to the weight of the evidence. Rather, defendant is disputing the trial court's determination that the victim was more credible than defendant. Considering the evidence all together, including the admissions by defendant and his fiancée that the victim knew defendant and would recognize him, we are not left with a definite and firm conviction that the trial court clearly erred in finding the victim credible, and in crediting the victim's identification of defendant as the perpetrator. Defendant is not entitled to a new trial on this basis.

Next, defendant argues, and the prosecutor agrees, that the trial court erred by ordering defendant to reimburse the county $1,010 for attorney fees without considering defendant's ability to pay before ordering reimbursement. As this Court explained in *People v Dunbar*, 264 Mich App 240, 255; 690 NW2d 476 (2004), "[t]he amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's foreseeable ability to pay." "'[R]epayment is not required as long as [defendant] remains indigent.'" *Id*. at 256, quoting *Alexander v Johnson*, 742 F2d 117, 124 (CA 4, 1984). In this case, there is no indication that the court considered defendant's ability to pay when ordering reimbursement. Accordingly, we vacate the trial court's reimbursement order and remand for the court to reconsider the question of reimbursement in light of defendant's current and future financial circumstances. *Dunbar*, *supra* at 255.

Lastly, defendant argues in a pro se supplemental brief that defense counsel was ineffective. We disagree.

Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id*. at 312, 314. To establish prejudice, defendant must show that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra* at 312, 314.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant first argues that defense counsel was ineffective because defendant informed counsel that there was a video surveillance camera outside the gas station where the robbery was committed, which may have captured the perpetrator's image, but counsel did not use this information at trial.

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

In this case, it is not apparent from the record that a videotape of the crime actually exists. The lower court record is devoid of any mention of a videotape, and on appeal, defendant has failed to provide any evidence, or even an offer of proof (such as an affidavit), indicating that the camera and videotape actually exist and, if so, what the videotape shows (if anything). Absent information that a videotape exists, or what it depicts, there is no basis for concluding that defense counsel was ineffective for not pursing this issue at trial.

Defendant also argues that defense counsel was ineffective for not more vigorously cross-examining the victim concerning his identification of defendant. We disagree. Whether and how to impeach a witness is a matter of trial strategy entrusted to counsel's professional judgment. *Flowers*, *supra* at 737. The principal issue in the case was identification. Defendant and the victim admittedly knew each other before the offense. The victim knew defendant's name, the street he lived on, and the kind of car he drove. Defendant admitted that the victim would recognize him. The record discloses that defense counsel attempted to impeach the accuracy and detail of the victim's observations, his memory of the events, his statement to the police, and his identification of defendant as the perpetrator.

We also reject defendant's argument that defense counsel was ineffective for failing to call an expert witness to testify about the inherent unreliability of eyewitness identification. Because this was a case in which defendant and the victim knew each other, there is no reasonable possibility that an expert's testimony would have served a useful purpose.

For these reasons, defendant has failed to show that he was denied the effective assistance of counsel.

Defendant's convictions and sentences are affirmed. We vacate the trial court's order requiring defendant to reimburse the county $1,010 and remand for further proceedings with respect to this issue. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter